IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 220 of 1994

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONEROF INCOME-TAX - Applicant(s)
Versus
NEHA BUILDERS PVT LTD - Respondent(s)

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Appearance :
MR BB NAIK for Applicant(s) : 1,
NOTICE SERVED for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE M.R. SHAH

Date : 18/08/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.S.GARG)

Mr. B.B. Naik, learned counsel for the Revenue.

2. Present Reference, under Section 256(1) of the Indian Income Tax Act, has been made by the Income Tax Appellate Tribunal, Ahmedabad Bench 'A', at the instance of the Revenue which is dissatisfied with the order of the Income Tax Appellate Tribunal who is aggrieved by the order passed by the Income Tax Appellate Tribunal in Income Tax Appeal No. 266/Ahd/90 (Annexure 'C') in the Reference Book. [We must record that, in most of the cases, we find that date of the Appellate Order is not exhibited on the final order nor the same is mentioned in the Reference Order].

3. The following question has been referred to this Court for its opinion;

> 'Whether, on the facts and in the circumstances of the case, the rental income received from any property in the construction business can be claimed under the head of 'Income from property' even though the said property was included in the closing stock and expenses on maintenance were debited to the profit and loss account ?'

4. The short facts, leading to the Reference, are that the non-applicant assessee company is engaged in the business of construction of property, one of the building properties was included in the Closing Stock in the Balance Sheet drawn for the business. The assessee filed revised Return submitting that a part of its property was given on rent and the income derived on that basis should be computed under the head 'Income from house property' and not as business income. The Assessing Officer, during the course of the assessment proceedings, observed that the expenses on maintenance of the property were debited to the profit and loss account and so also the building was shown as stock-in-trade, therefore the property would partake the character of the stock and any income derived from the stock cannot be taken to be income from property. It accordingly framed the assessment order. As the Appeal, against the order, proved futile, the assessee filed the abovereferred Income Tax Appeal before the Income Tax Appellate Tribunal. The Tribunal allowed the Appeal observing, inter alia, that any dividend received on the shares or any interest received from the Bank would be taken to be income from other sources, therefore any income derived under the head of 'Rent' would also become income from the property, it accordingly allowed the Appeal and directed reconsideration of the matter.

5. Mr. Naik, learned counsel appearing for the Revenue, submits that if the property is used as a property, then any income derived from the property would be an income from property, but if the property is used as a stock, then any income from the stock would not be an income from the property. He submits that the analogy applied by the Tribunal is patently illegal.

6. We have heard Mr. Naik at length. None appears for the respondent, despite service of notice.

7. From the order passed by the learned Commissioner, Income Tax (Appeals), it would clearly appear that the case of the assessee was that the company was incorporated with the main object of purchase, take on lease, or acquire by sale, or let-out the buildings constructed by the assessee. Development of land or property would also be one of the businesses for which the company was incorporated.

8. True it is, that income derived from the property would always be termed as 'income' from the property, but if the property is used as 'stock-in-trade', then the said property would become or partake the character of the stock, and any income, derived from the stock, would be

'income' from the business, and not income from the property. If the business of the assessee is to construct the property and sell it or to construct and let-out the same, then that would be the 'business' and the business stocks, which may include movable and immovable, would be taken to be 'stock-in-trade', and any income derived from such stocks cannot be termed as 'income from property'. Even otherwise, it is to be seen that there was distinction between the 'income from business' and 'income from property' one one side, and 'any income from other sources'. The Tribunal, in our considered opinion, was absolutely unjustified in comparing the rental income with the dividend income on the shares or interest income on the deposits. Even otherwise, this question was not raised before the subordinate Tribunals and, all of sudden, the Tribunal started applying the analogy.

9. From the statement of the assessee, it would clearly appear that it was treating the property as 'stock-in-trade'. Not only this, it will also be clear from the records that, except for the ground-floor, which has been let-out by the assessee, all other portions of the property constructed have been sold out. If that be so, the property, right from the beginning was a 'stock-in-trade'.

10. Agreeing with the submissions made by Mr. Naik, learned counsel for the Revenue, we hold that the Tribunal

was not correct in granting the Appeal of the assessee.

11. For the reasons aforesaid, the Reference deserves to be answered in favour of the Revenue. It is accordingly answered and stands disposed of. No costs.

[R.S. Garg, J.]

rmr. [M.R. Shah, J.]